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APPENDIX A

COURT OF APPEALS ORDER STAYING MANDATE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 1-2394MNST

UNITED STATES OF AMERICA,

Appellee,

vs.

TIMOTHY PATRICK KORNWOLF,

Appellant.

Appeal from the
United States District Court
for the District of Minnesota

Appellant Kornwolf's motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including 5/9/02. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court. (5362-010199)

February 8, 2002

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals
Eighth Circuit

APPENDIX B

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-2394

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TIMOTHY PATRICK KORNWOLF,

Defendant-Appellant.

Appeal from the
United States District Court
for the District of Minnesota.

Submitted: November 12, 2001

Filed: January 16, 2002 (Corrected 3/4/02)

(Corrected 4/3/02)

Before LOKEN, LAY, and HEANEY, Circuit Judges.

LAY, Circuit Judge.

Timothy P. Kornwolf pled guilty to violating the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a), and the Migratory Bird Treaty Act, 16 U.S.C. § 703, by attempting to sell two Native American artifacts containing eagle feathers. Kornwolf entered a conditional plea of guilty to four counts of the indictment, reserving the right to withdraw the plea if, on appeal, the acts were found unconstitutional as applied to Kornwolf. At sentencing, the Government asked the district court[1] for an order requiring Kornwolf to return the $12,000 paid to him for the artifacts. The district court refused to issue such an order. Kornwolf has appealed the district court's holding that the acts do not cause an unconstitutional taking of his property.[2] We affirm.

Facts

Kornwolf owned an American Indian headdress and Sioux dance shield. Both of the artifacts contain golden eagle feathers. Kornwolf came into possession of the artifacts through his great uncle before October 24, 1962, the effective date of the Bald and Golden Eagle Protection Act.[3] A regulation, authorized by the Migra-

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[1]The Honorable David S. Doty, United States District Judge for the District of Minnesota, presiding.

[2] Kornwolf was sentenced to three years probation with a special condition that he participate for a period of 180 days in a home detention program, which may include electronic monitoring, a fine of $2000 and a special assessment of $400. The district court stayed Kornwolf's sentence pending this appeal.

[3]"Whoever ... shall knowingly ... take, possess, sell, purchase, barter, offer to sell ... any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part ... shall be fined not more than $5,000 or imprisoned not more than one year or both. . . ." 16 U.S.C. § 668(a).

tory Bird Treaty Act, became effective after the Bald and Golden Eagle Protection Act. *See* 50 C.F.R. §§ 22.1, 22.2(a)(1)-(2) (2001).[4] Under the acts, it is unlawful to sell or attempt to sell eagle feathers even though they were lawfully acquired prior to the effective dates of the acts.

On November 1, 1999, Kornwolf sold the dance shield for $7000 to an undercover Norwegian law enforcement officer working with the United States Fish and Wildlife Service. Later, the undercover agent made two wire transfers to Kornwolf for the headdress totaling $5000. The headdress was later seized pursuant to a search warrant on January 19, 2000.

Analysis

This case, at least on its face, is strikingly similar to *Andrus v. Allard*, 444 U.S. 51 (1979). In *Allard*, the Supreme Court upheld the constitutionality of the Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act against a Fifth Amendment takings claim. Kornwolf contends this case is not governed by *Allard* because the recent takings cases "demonstrate both a greater solicitude to the burdens placed on property owners by governmental regulations and less willingness to assume a justifying nexus between those burdens and public purpose."

The Supreme Court has stated, "'[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which

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4"The import, export, purchase, sale, trade, or barter of bald and golden eagles, or their parts, nests, or eggs is prohibited." 50 C.F.R. § 22.1 (2001).

directly controls, leaving to this Court the prerogative of overruling its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson / Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Our court has adhered to this directive. *See, e.g., United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001); *United States v. Maynie*, 257 F.3d 908, 918 (8th Cir. 2001); *see also United States v. Singletary*, 268 F.3d 196, 205 (3rd Cir. 2001); *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1057 (9th Cir. 2000); *Figueroa v. Rivera*, 147 F.3d 77, 81 n. 13 (1 st Cir. 1998). Thus, the issue is whether *Allard* is directly controlling. *See Agostini*, 521 U.S. at 237.

The facts of the present case essentially mirror *Allard*. Kornwolf asserts one crucial factual distinction: *Allard* did not directly address feathers owned by an individual prior to the effective dates of the acts. However, in *Allard*, the Court's ruling extends to include feathers acquired prior to the passing of the Bald and Golden Eagle Protection Act:

> The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.

Allard, 444 U.S. at 58. This rationale also applies to the Migratory Bird Act, thereby enabling the ban of "commercial transactions in covered bird parts in spite of the fact that the parts were lawfully taken before the onset of federal protection." *Id.* at 63. Therefore, the Court's holding in *Allard*, "that the simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment," *id.* at 67-68, encompasses bird feathers acquired prior to the effective date of the acts, even though not directly addressed.

Kornwolf also attempts to distinguish this case from *Allard* on procedural grounds. Kornwolf argues the difference between the facial challenge in *Allard* and Kornwolf s as applied challenge removes the present dispute from the rubric of *Allard*. The first alleged distinguishing characteristic is the provenance of the feathers; the artifacts, which contain eagle feathers, were acquired prior to the effective dates of the acts. As earlier demonstrated, the provenance of the artifact does not remove the present case from the confines of the ruling. *See id.*

The second alleged distinguishing characteristic is the value of the feathers. As demonstrated by *Allard*, the value is immaterial. *See id.* ("[T]he simple prohibition of the sale of lawfully acquired property in this case does not effect a taking in violation of the Fifth Amendment."). However, if a court were to examine the value of the feathers, which the lower court did not, it would only lend further credence to the constitutional finding. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (stating that if just compensation is received then no claim exists against the Government); *Ruckelshaus*

v. Monsanto Co., 467 U.S. 986, 1013 (1984) (stating if just compensation were to be received, "then Monsanto would have no claim against the Government for a taking"). Although the reasonable value of the artifacts with and without the feathers has not been established, Kornwolf did receive compensation. *See, e.g., Farmland Pres. Ass'n v. Goldschmidt*, 611 F.2d 233, 237-38 (8th Cir. 1979); *United States v. 91.90 Acres of Land, Situated in Monroe County, Mo.*, 586 F.2d 79, 86 (8th Cir. 1978). Kornwolf was paid $7000 for the dance shield and $5000 for the headdress. The district court refused to order Kornwolf to disgorge the $12,000. If a court were to examine the value of the artifacts, it would be an exercise in determining whether additional compensation, beyond the $12,000, was required in order to suffice as "just compensation." Thus, instead of removing the case from the control of *Allard*, Kornwolf's receipt of compensation for the artifacts dictates it is more likely not to be deemed a taking without just compensation. *See Allard*, 444 U.S. at 67 (awarding no compensation); *Williamson County,* 473 U.S. at 194; *Monsanto*, 467 U.S. at 1013.

Kornwolf's last alleged distinguishing characteristic is that the asserted claim is in defense to criminal prosecution.[5] Although *Allard* did not involve criminal prosecution, it did address the constitutionality of statutes that prohibited enumerated actions and even noted the prior criminal conviction of one of the appellees under the Bald and Golden Eagle Protection Act. *Allard*, 444 U.S. at 54 n.2. Therefore, the Court clearly envisioned the acts' enforcement within a criminal context.

[5]The parties have neither cited any authority, nor has any been found, that applies the takings clause as a defense to criminal prosecution.

Furthermore, analyzing this allegedly distinguishing fact in light of the test for takings illustrates it is a difference without a distinction. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (stating the factors in determining a taking are the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectation, and the character of the government regulation with regard to whether the invasion is physical or a necessary readjustment of economic benefits and burdens).

Conclusion

Because *Allard* is directly controlling, this court need not examine the present case in light of recent takings cases.

Judgment AFFIRMED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

STAY ORDER OF DISTRICT COURT

[Stamped "FILED JUN 05 2001
FRANCIS E. DOSAL, CLERK
Judgment Ent'd. _____
Deputy Clerk's Initials /s/ leg
(attys, PO, USM)"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Criminal No. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,

Defendant.

ORDER

This matter is before the court on defendant's motion pursuant to Fed. R. Crim. P 58(g)(3) and 18 U.S.C. §3143(b)(1) to stay his sentence pending appeal. Defendant pleaded guilty in this case on October 31, 2000, and was sentenced on May 29, 2001, to a three-year term of probation, including 180 days of home detention. Defendant's plea agreement clearly sets forth his intent to appeal his conviction. The subject of the appeal raises a substantial question of law, therefore the court does not believe that appeal is made only for the purpose of delay. Further, the court finds that defendant is not likely to flee nor does he pose a danger to the community.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's motion to stay his sentence pending appeal is granted.

2. Defendant shall remain on bond pending appeal, subject to the same conditions set forth in his original bond.

Dated: June 4. 2001

/s/ David S. Doty

David S. Doty, Judge
United States District Court

APPENDIX D

DISTRICT COURT JUDGMENT

[Stamped "FILED MAY 29, 2001
Francis E. Dosal, Clerk
Judgment Entd _____
Deputy Clerk /s/ PS
(dist'd)"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

TIMOTHY PATRICK KORNWOLF

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After
November 1, 1987)

CASE NUMBER:
00-199(1)(DSD/JMM)

ROBERT D. MILLER
Defendant's Attorney

THE DEFENDANT:

[x] pleaded

guilty to counts:

1, 2, 3, 4 of the Superseding Indictment.

Accordingly, the defendant is adjudged guilty of such counts, which involves the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
See next page.			

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Special Assessment Amount $ 400.00 in full and immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **391-44-0641**

Defendant's Date of Birth: **02/22/1946**

Defendant's USM No.: **09531-041**

Defendant's Residence Address:

1306 Third Street South
Stillwater, MN 55082

Defendant's Mailing Address:

May 29, 2001
Date of Imposition of Judgment

/s/ David S. Doty
Signature of Judicial Officer

DAVID S. DOTY, Senior United States District Judge
Name & Title of Judicial Officer

May 29, 2001
Date

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
16 USC § 668	Selling a Sioux Dance Shield Containing Golden Eagle feathers and offering to sell a headdress containing Golden Eagle feathers	11/01/1999	1
16 USC § 703	Selling a Sioux Dance Shield Containing Golden Eagle feathers and offering to sell a headdress containing Golden Eagle feathers	11/01/1999	2
16 USC § 668	Selling a headdress containing Golden Eagle feathers	11/25/1999	3
16 USC § 703	Selling a headdress containing Golden Eagle feathers	11/25/1999	4

PROBATION

The defendant is hereby placed on probation for a term of 3 years on each of Counts 1 through 4, to be served concurrently.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[x] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[x] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated

below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit home [*sic*: him] or her at an [*sic*: any] time a [*sic*: at] home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapons.

2. The defendant shall participate for a period of 180 days in a home detention program which may include electronic monitoring. The defendant is ordered to pay for the costs of the electronic monitoring.

3. Because the instant offense is not drug-related and the defendant does not have a history of drug abuse, the defendant is not required to undergo manda-

tory drug testing as set forth by 18 U.S.C. §§ 3563(a) and 3583(d).

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	Fine	Restitution
Totals:	$ 10,000.00	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement .....$_____

FINE

The above fine includes costs of incarceration and/or supervision, including electronic monitoring, in the amount of $ 8,000.00.

The defendant shall pay interest on any fine of more than $2500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[x] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[x] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 100, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until up to 60 days. An amended Judgment in a Criminal Case will be entered after such determination.

[ ] The court modifies or waives interest on restitution as follows:

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order of percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of pymnt
	TOTALS:	$____	$____

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [x] special assessment in full immediately.

B [x] $ 2,000.00 of fine immediately, balance due (in accordance with E).

C [ ] not later than ____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [x] in equal, monthly installments of $222.22 over a period of 3 years to commence immediately.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[x] The defendant shall forfeit the defendant's interest in the following property to the United States:

Pursuant to the plea agreement, the government has agreed not to dispose of the evidence that was seized during the investigation. If defendant prevails on his appeal of the constitutionality of the statute, then the evidence that was seized will be returned to defendant, and defendant shall pay to the government the sum of $12,000. If the appeal is unsuccessful, then the government will retain possession of the evidence and defendant will have no ownership interest in the evidence that was seized.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary payments are to be made as directed by the court, the probation officer, or the United States Attorney.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

see attachment

Guideline Range Determined by the Court:

Total Offense Level: 9

Criminal History Category: II

Imprisonment Range: 6 to 12 months

Supervised Release Range: 1 year

Fine Range: $ 1,000 to $ 10,000

[ ] Fine is waived or is below the guideline range, because of inability to pay.

Total Amount of Restitution: $___

[ ] Full restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of

a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s).

[x] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

FINDINGS OF FACT

The court adopts the factual statements contained in the presentence investigation report as to which there is no objection, and, as to the controverted factual statements, resolves the objections as follows:

Paragraph 2: Defendant contends the PSR should be amended to reflect his constitutional challenge to the statutes under which he has been convicted. The references to defendant's unsuccessful pre-trial motions are irrelevant to sentencing therefore properly excluded.

Paragraphs 4-12: Defendant also contends that information in the PSR regarding James O'Donnell's prosecution on similar charges in South Dakota and O'Donnell's assertions that defendant has trafficked other illegal artifacts should be excluded as irrelevant to this case. Based on the agreement of the parties as to the PSR, the court finds by a preponderance of the evidence that defendant has sold not only the two family heirlooms involved in the counts of conviction, but also other Native American artifacts containing golden eagle feathers.

Paragraphs 13-16: Defendant claims that the description of the sale of artifacts to Ivar Husby is generally

incomplete and should be modified to include additional information. He also denies that he told Husby not to tell anyone who sold him the Native American dance shield. This factual dispute need not be resolved by the court because the disputed matters will have no impact on sentencing.

GUIDELINE CALCULATIONS

The parties have no objections to the guideline calculations contained in the PSR, however, the court notes that the defendant's offense level is enhanced by a $22,000 valuation ($15,000 headdress, $7,000 shield) which includes not only the value of the illegal eagle feathers but also the value of the headdress and dance shield. The court believes that defendant should be penalized only for the value of the eagle feathers, however, separating their value from the overall value of the artifacts is difficult. Some valuation enhancement is clearly appropriate, given that illegal feathers add considerable value to a Native American artifact. For example, in the case of the headdress, information previously submitted by the defendant (McCormick Aff., ¶ 4-5) indicates that the feathers appear to have enhanced the value of the headdress by at least $8,000. Assuming a similar increase in value with the dance shield, the court believes valuing the eagle feathers in excess of $10,000 but less than $20,000 is reasonable. *See* U.S.S.G. § 2Fl.1, commentary ("The district court need only made a reasonable estimate of the range of loss given the available information.") For these reasons, the court will lower defendant's valuation enhancement from 4 levels to 3 levels. U.S.S.G. § 2Fl.1(b)(1)(D) and (E).

Defendant moves for a downward departure under

guideline section 4A1.3, arguing that his criminal history points over represent the seriousness of his past conduct. In deciding whether a departure under Section 4A1.3 is justified, the court considers the historical facts of the defendant's criminal career. *See United States v. Senior*, 935 F.2d 149, 151 (8th Cir. 1991); *United States v. Smith*, 909 F.2d 1164, 1169-70 (8th Cir. 1990), *cert. denied*, 498 U.S. 1032 (1991); U.S.S.G. § 4A1.3(a)-(e).

The court has reviewed defendant's criminal history and concludes that a departure under Section 4A1.3 is not warranted. While the court agrees that the insufficient funds charge is a minor offense, the two drinking and driving offenses are serious charges which together properly place defendant in a criminal history category II. Defendant suggests that one of these convictions is a "borderline" case, but as the government correctly notes, the defendant presents no constitutional or federal statutory argument which would permit this collateral challenge to a prior conviction and sentence. Accordingly, defendant's downward departure on this basis is denied.

Defendant also contends that a departure under *Koon v. United States*, 518 U.S. 81 (1996), is warranted. A departure under *Soon* [*sic*: *Koon*] is reserved for those rare cases that stand outside of the heartland of cases contemplated by the Sentencing Commission when it formulated the sentencing guidelines. Defendant argues that this is just such a case because the wildlife offense guidelines do not contemplate defendant's sale of two family heirlooms, for which no contemporary golden eagles were killed. Defendant's argument that the heartland of cases involves only "live or recently-killed birds" is without merit, as the court clearly

indicated during defendant's constitutional challenges to the statute of conviction. The government has established that defendant's dealings in illegal artifacts is not limited to the sale of the headdress and dance shield to Ivar Husby. Accordingly, this basis for departure is denied.

APPENDIX E

ORDER OF DISTRICT COURT DENYING DEFENDANT'S MOTION TO DISMISS COUNTS 1-4 OF SUPERSEDING INDICTMENT

[Stamped "FILED OCT 30 2000
FRANCIS E. DOSAL, CLERK
Judgment Ent'd. _____
Deputy Clerk's Initials /s/ PS"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Criminal No. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA,
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

ORDER

This matter is before the court on defendant's objections to Magistrate Judge John M. Mason's report and recommendation dated October 16, 2000. In his report, the magistrate judge recommended that defendant's motion to dismiss Counts 1, 2, 3 and 4 the indictment [Doc. No. 35] be denied.[1] Defendant objects, contending that the statutes under which he is charged, 16 U.S.C. § 668(a), the Bald and Golden Eagle Protection Act, and 16 U.S.C. § 703, the Migratory Bird Treaty Act, are unconstitutional as applied.

Defendant is charged with attempting to sell various Native American artifacts containing eagle feathers and scissortail flycatcher feathers, in violation of federal laws designed to protect those birds. Defendant argues that two of the artifacts, a Plains Indian headdress and Sioux Indian dance shield, both of which contain golden eagle feathers, have been in the possession of his family since before the passage of the statutes under which he is charged. Defendant argues the federal laws which criminalize the sale of Native American artifacts are unconstitutional as applied to his attempts to sell these artifacts.

Defendant has previously argued to this court that the Bald and Golden Eagle Protection Act is unconstitutional as applied. In a prior motion to dismiss, defendant

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[1] The magistrate judge also recommended that: (1) the government's motion to dismiss Counts 5, 6, 7 and 8 [Doc. No. 46] be granted, and (2) defendant's motion to dismiss Counts 5 and 6 [Doc. No. 31], motion to strike words from Counts 5 and 6 [Doc. No. 32] and motion to strike references to headdress from Counts 5 and 6 [Doc. No. 34] be denied as moot. Defendant concurs with the recommendation as to the government's motion to dismiss Counts 5, 6, 7 and 8, and concurs that the dismissal of those counts renders his motions as to Counts 5 and 6 moot.

argued to the magistrate judge that the Act exceeded Congress' authority under the Commerce Clause. In his later objections to the magistrate judge's report, defendant also argued that the Act violated the Just Compensation Clause of the Fifth Amendment. This court disagreed with defendant that the Act was unconstitutional on either basis, and in its order adopting the magistrate judge's recommendation, the court emphasized to defendant that the United States Supreme Court has clearly rejected Fifth Amendment challenges to the Act. *See Andrus v. Allard*, 444 U.S. 51 (1979).

Defendant now brings a duplicative motion to dismiss the counts associated with the headdress and shield, arguing that the statutes as applied here authorize a governmental taking without compensation. This court's ruling on the prior motion to dismiss and the magistrate judge's recommendation on the current motion to dismiss make it clear that unless the Supreme Court overrules *Allard*, the congressional prohibition on the sale of *all* eagle feathers stands as a lawful means to protect and preserve threatened and endangered bird species. Therefore, defendant's motion to dismiss Counts 1, 2, 3 and 4 of the superseding indictment is properly denied.[2]

---

[2] Defendant asserts in the alternative that this court should recognize the age of the feathers as an affirmative defense and give the jury an instruction to that effect. Objections to a report and recommendation are not the appropriate forum for submitting proposed jury instructions. Defendant should raise this issue in his proposed instructions to the court, which the court will review with the parties during the regularly scheduled jury charge conference.

After conducting a *de novo* review of the file and record, the court adopts the magistrate judge's report and recommendation. Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's motion to dismiss Counts 1, 2, 3 and 4 of the superseding indictment [Doc. No. 35] is denied.

2. The government's motion to dismiss Counts 5, 6, 7 and 8 of the superseding indictment [Doc. No. 46] is granted.

3. Defendant's motion to dismiss Counts 5 and 6 [Doc. No. 31], motion to strike words from Counts 5 and 6 [Doc. No. 32] and motion to strike references to headdress from Counts 5 and 6 [Doc. No. 34] are denied as moot.

Dated: October 30, 2000

/s/ David S. Doty

David S. Doty, Judge
United States District Court

APPENDIX F

ORDER OF DISTRICT COURT DENYING DEFENDANT'S MOTION TO DISMISS ORIGINAL INDICTMENT

[Stamped "FILED SEP 22, 2000
FRANCIS E. DOSAL, CLERK
Judgment Ent'd. _____
Deputy Clerk's Initials /s/ mf
(Attys)"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Criminal No. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,

Defendant.

ORDER

This matter is before the court on defendant's objections to Magistrate Judge John M. Mason's report and recommendation dated August 23, 2000. In his report, the magistrate judge recommended that defendant's motion to dismiss the indictment [Doc. No. 14] be denied. Defendant objects, contending that the statute under which he is indicted, 16 U.S.C. § 668(a), the "Bald and Golden Eagle Protection Act," is unconstitutional as applied.[1] Specifically, defendant asserts that prohibiting the sale of an Indian headdress and shield which were allegedly in the possession of defendant's family prior to the enactment of the Golden Eagle Protection Act violates the Just Compensation Clause of the Fifth Amendment.

As the magistrate judge's report fully discussed, the United States Supreme Court has previously rejected a Fifth Amendment challenge to the Act. *See Andrus v. Allard*, 444 U.S. 51 (1979). The court understands that in *Allard*, no assertion was made that any of the artifacts were acquired prior to 1962, the year that Congress amended the Bald Eagle Protection Act to include golden eagles. However, the court disagrees with defendant that *Allard* does not apply where pre-Act chain of custody might be established. The Court found in *Allard*:

> The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Con-

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[1] Subsequent to oral argument on this motion, the government obtained a superceding [*sic*: superseding] indictment which contains additional charges under the Migratory Bird Treaty Act.

> gress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because *there is no sure means by which to determine the age of [illegible]d feathers; feathers recently taken can easily be passed off as having been obtained long ago.*

Id. at 58-59 (emphasis added). As the Court's discussion indicates, only through a complete prohibition of the sale of bird feathers can the Act achieve its stated goals. Therefore, defendant's motion to dismiss the indictment is properly denied.

After conducting a *de novo* review of the file and record, the court adopts the magistrate judge's report and recommendation. Accordingly, **IT IS HEREBY ORDERED** that defendant's motion to dismiss the indictment [Doc. No. 14] is denied.

Dated: September 22, 2000

/s/ David S. Doty

David S. Doty, Judge
United States District Court

APPENDIX G

REPORT AND RECOMMENDATION OF MAGISTRATE RECOMMENDING DENIAL OF DEFENDANT'S MOTION TO DISMISS COUNTS 1-4 OF SUPERSEDING INDICTMENT

[Stamped "FILED OCT 16 2000
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JUDGMENT ENTD ____
DEPUTY CLERK /s/ leg"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

REPORT AND RECOMMENDATION

The above matter came on for hearing before the undersigned on October 10, 2000 upon Defendant's Motion to Dismiss Counts 5 and 6 [Docket No. 31], Motion to Strike Words from Counts 5 and 6 [Docket No. 32], Motion to Strike References to Headdress from Counts 5 and 6 [Docket No. 34], and Motion to Dismiss Counts 1, 2, 3, and 4 [Docket No. 35]. Assistant United States Attorney Clifford Wardlaw appeared on behalf of Plaintiff; Robert Miller, Esq. appeared on behalf of Defendant. On October 13, 2000, the Government filed a Motion to Dismiss Counts 5, 6, 7, and 8. The matter has been referred to the undersigned by Judge David S. Doty for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Upon the following Findings of Fact/Report, it is recommended that (1) the Government's Motion to Dismiss Counts 5, 6, 7, and 8 be granted; (2) Defendant's Motion to Dismiss Counts 5 and 6 [Docket No. 31], Motion to Strike Words from Counts 5 and 6 [Docket No. 32], and Motion to Strike References to Headdress from Counts 5 and 6 [Docket No. 34] be denied as moot; and (3) Defendant's Motion to Dismiss Counts 1, 2, 3, and 4 [Docket No. 35] be denied.

FINDINGS OF FACT/REPORT

Defendant is charged with violating provisions of the Bald and Golden Eagle Protection Act, 16 U.S.C. §668(a), and the Migratory Bird Treaty Act, 16 U.S.C. §703. Defendant moves to dismiss Counts 1-4 of the Superceding [*sic*: Superseding] Indictment on the grounds that these statutes are unconstitutional as they are being applied in this case, because they violate the Just

Compensation Clause of the Fifth Amendment to the U.S. Constitution.

Defendant made a similar argument in his Motion to Dismiss the claims against him under the original Indictment. The arguments in the prior motion were based on Defendant's assertion that the Bald and Golden Eagle Protection Act exceeded Congress's Commerce Clause power. We recommended denial of the Motion [Docket No. 22], and the District Judge issued an Order to that effect [Docket No. 29].

In the instant Motion, Defendant argues that the statutes authorize a governmental taking without just compensation, because parties who acquired eagle feathers prior to the enactment of the statutes are prohibited from selling those feathers. Defendant recognizes that the Supreme Court has previously decided this issue, and held that denial of the right to sell feathers acquired prior to the enactment of the statutes is not a taking in terms of the Just Compensation Clause. *Andrus v. Allard*, 444 U.S. 51, 58-59 (1979) (cited in Defendant's Memorandum in Support of Motion to Dismiss at p. 5). He asks us to find otherwise, based upon an analysis of Supreme Court cases dealing with property rights that have been decided since *Andrus*.

The Supreme Court has repeatedly held that if a precedent of the Court has direct application in a case, yet appears to rest on reasons rejected in another line of Supreme Court decisions, the lower courts must follow the case which directly controls, leaving the Supreme Court to overrule its own decision if it so chooses. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson / American Express, Inc.*, 490 U.S. 477, 484 (1989). This principle is directly applicable in

the instant case. It is up to the Supreme Court to overrule *Andrus* if such action is appropriate, not this Court. For now, we are bound to follow Supreme Court precedent, which clearly holds that the statutes under which Defendant is charged do not constitute a taking for purposes of the Constitution.

RECOMMENDATION

For the reasons set forth above, it is recommended that (1) the Government's Motion to Dismiss Counts 5, 6, 7, and 8 be granted; (2) Defendant's Motion to Dismiss Counts 5 and 6 [Docket No. 31], Motion to Strike Words from Counts 5 and 6 [Docket No. 32], and Motion to Strike References to Headdress from Counts 5 and 6 [Docket No. 34] be denied as moot; and (3) Defendant's Motion to Dismiss Counts 1, 2, 3, and 4 [Docket No. 35] be denied.

Dated: October 16, 2000

/s/ John M. Mason

JOHN M MASON
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties on or before **October 30, 2000** a copy of this Report, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing on or before **October 30, 2000**.

APPENDIX H

REPORT AND RECOMMENDATION OF MAGISTRATE RECOMMENDING DENIAL OF DEFENDANT'S MOTION TO DISMISS ORIGINAL INDICTMENT

[Stamped "FILED AUG 24 2000
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JUDGMENT ENTD _____
DEPUTY CLERK /s/ PS"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Criminal No. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA
Plaintiff,

v.

TIMOTHY KORNWOLF,
Defendant.

REPORT AND RECOMMENDATION

The above matter came on for hearing before the undersigned on August 14, 2000 upon Defendant's Motions to Suppress Statements, Admissions and Answers [Docket No. 11]; to Suppress Evidence Obtained as a Result of Search and Seizure [Docket No. 12]; and to Dismiss Indictment [Docket No. 14].[1] Assistant United States Attorney Clifford B. Wardlaw appeared on behalf of Plaintiff; Robert D. Miller, Esq. appeared on behalf of Defendant. At the hearing, Defendant withdrew his Motions to Suppress Statements, Admissions and Answers [Docket No. 11], and to Suppress Evidence Obtained as a Result of Search and Seizure [Docket No. 12], as moot. The matter was referred to the undersigned by Judge David S. Doty for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

Upon the following Findings of Fact/Report, it is recommended that Defendant's Motion to Dismiss Indictment [Docket No. 14] be denied.

FINDINGS OF FACT/REPORT

Defendant has been charged with four counts of violating the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668. Defendant moves to dismiss the Indictment against him on the basis that 16 U.S.C. § 688 is unconstitutional.

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[1] Defendant's Motions to Compel Attorney for the Government to Disclose Evidence Favorable to the Defendant [Docket No. 8]; for Disclosure of 404 Evidence [Docket No. 9]; to Disclose and Make Informant Available for Interview [Docket No 10]; for List of Government Witnesses [Docket No. 13]; for Evidentiary Hearing [Docket No. 15]; and for Continuance [Docket No. 16] are resolved in a separately issued Order.

I. BALD AND GOLDEN EAGLE PROTECTION ACT

16 U.S.C. § 688(a) [*sic*: § 668(a)] provides, in relevant part:

> Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: *Provided* . . . That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.[2]

Congress's stated purpose for enacting the Bald and Golden Eagle Protection Act (the "Act") was to protect eagles from extinction. Bald Eagle Protection Act, ch.

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[2] Protections for the golden eagle were added through Pub. L. 87-884 as part of a 1962 amendment to the statute.

278, § 1, 54 Stat. 250 (1940).

Defendant concedes that Congress had the authority to enact a statute prohibiting the sale of newly gathered eagle feathers in order to protect eagles from extinction. However, Defendant argues that the eagle feathers bought and sold by him were originally gathered "before the prohibition of their trade." Def. Memo. p. 3. Defendant would have us find that the basis for the statute put forth by Congress, *i.e.* preventing the extinction of golden and bald eagles, does not provide a constitutional basis for the statute as applied in this case.

In response, the Government argues that 16 U.S.C. § 668(a) is a constitutional exercise of Congress's authority to regulate interstate commerce. See U.S. Const., Art. I, § 8, cl. 3. The Government does not respond to Defendant's specific argument, but rather asserts that Congress' broad power to regulate wildlife supports the constitutionality of the Act.

At the hearing, Defendant submitted the testimony of Professor Richard Edwards, an expert in the area of Plains Indians artifacts. The Government's objection to Professor Edwards' testimony on the basis of relevance was taken under advisement by the Court. That objection is overruled.

Professor Edwards testified that virtually no market exists for golden eagle feathers because people are concerned about being prosecuted under the Act. He also testified that he knows of at least some occasions where old eagle feathers on Indian artifacts have been replaced with new eagle feathers. Professor Edwards also testified that he would not be able to tell the difference between an old (collected before the effective date of the Act) and a new eagle feather by sight, but

rather would have to rely on documentation to determine its age.

II. DISCUSSION

"The Supreme Court has identified three broad categories of activity that fall within the scope of Congress's Commerce Clause power. Congress may (1) regulate the use of the channels of interstate commerce, (2) regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) regulate activities that substantially affect interstate commerce." *United States v. Wright*, 128 F.3d 1274, 1274-75 (8th Cir. 1997) (*citing U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995)).

As the Fourth Circuit has pointed out, there appear to be no cases where any endangered species regulation, including the Act, has been invalidated for exceeding Congress's commerce clause power. *Gibbs v. Babbitt*, 214 F.3d 483, 496 (4th Cir. 2000). For example, in *United States v. Lundquist*, 932 F.Supp. 1237 (D.Or. 1996), the court faced a challenge to the Act similar to the one advanced by Defendant. The court found defendant's argument that the effect on interstate commerce was not substantial to be lacking in merit. *Id.* at 1245. The court explained that "the possession of eagle parts is an activity which affects a broad regulatory scheme relating to commercial transactions and which, when viewed in the aggregate with similar activities nation-wide, substantially affects interstate commerce." *Id.*

The Ninth Circuit found the Act to be a valid exercise of Congress's commerce power in *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996). The court recognized that "[t]he Bald Eagle Protection Act, amended in 1962 to include golden eagles, was passed to

protect eagles from extinction." *Id.* at 1481. "Both commerce in and possession of eagle parts, each taken as a class, have substantial effects on interstate commerce, because both activities, even when conducted purely intrastate, threaten the eagle with extinction. . . . Extinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material." *Id.*

We agree with the reasoning of the Ninth Circuit in *Bramble*. Furthermore, we note that the distinction Defendant seeks to make between old and new eagle feathers does not change the analysis. Defendant's expert on Indian artifacts testified that he would not purchase an artifact from which the original feather had been removed, and he also testified that he would not be able to tell a new from an old eagle feather, but would have to rely on documents produced by the seller to determine the feather's age. If it is not possible to tell an old feather from a new feather by sight, dealers could certainly attempt to pass off a new feather as an old feather that was originally part of an object. Only through the prohibition of the sale of all eagle feathers can Congress achieve its stated goal of the protection of bald and golden eagles.

We note that our recommendation is further supported by *Andrus v. Allard*, 444 U.S. 51 (1979). In *Andrus*, the United States Supreme Court heard a different constitutional challenge to the Act. The defendant [*sic*: plaintiffs in *Andrus v. Allard*] argued that

prohibiting the sale of eagle feathers collected before the effective date of the Act violated his Fifth Amendment property rights. *Id.* at 54-55. The defendant made an almost identical argument to the argument advanced by Defendant in this case; he argued that prohibiting the sale of eagle feathers taken before it was against the law to do so did not further Congress's stated purpose of protecting eagles from extinction. *Id.* at 56. However, the defendant in *Andrus* used this argument to support his claim that the Act violated the Fifth Amendment, rather than the commerce clause, as Defendant here argues.

Despite the fact that the Court was not considering a commerce clause challenge, its discussion of the Act is applicable here. In holding that the statute prohibited the sale of old, as well as new, eagle feathers, the Court stated:

> The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.

Id. at 58-59.

The Supreme Court's discussion in *Andrus* directly supports Plaintiff's position on the Motion before the Court. We recommend that Defendant's Motion be denied, in keeping with prevailing law on the constitutionality of 16 U.S.C. § 668(a).

RECOMMENDATION

For the reasons set forth above, it is recommended that Defendant's Motion to Dismiss Indictment [Docket No. 14] be denied.

Dated: August 23, 2000

/s/ John M. Mason

JOHN M. MASON
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties on or before **September 6, 2000** a copy of this Report, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing on or before **September 6, 2000**.

APPENDIX I

BALD AND GOLDEN EAGLE PROTECTION ACT[1]

16 U.S.C. 668(a)(2000)

Whoever,... shall knowingly... take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: *Provided*, That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $ 10,000 or imprisoned not more than two years, or both: *Provided further*, That the commission of each taking or other act prohibited by this section with respect to a bald or golden eagle shall constitute a separate violation of this section: ... *Provided further*, That nothing herein shall be construed to prohibit possession or transportation of ... any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.

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[1] The provisions related to the golden eagle were added on October 24, 1962. Golden Eagle Protection Act, Pub. L 87-884, 76 Stat. 1246 (1962).

APPENDIX J

MIGRATORY BIRD TREATY ACT

16 U.S.C.§ 703 (2000)

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and [Great Britain, the United Mexican States, Japan, and the Union of Soviet Socialist Republics].

16 U.S.C.§ 707(b)(2000)

(b) Whoever, in violation of this subchapter, shall knowingly-

(1) ...

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

APPENDIX K

REGULATION OF THE U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR

50 C.F.R.§ 22.2(a)(l) (2)(1999)

(a)(1) You can possess or transport within the United States, without a Federal permit:

(i) ...

(ii) Any live or dead golden eagles, or their parts, nests, or eggs that were lawfully acquired before October 24, 1962.

(2) You may not transport into or out of the United States, import, export, purchase, sell, trade, barter, or offer for purchase, sale, trade, or barter ... golden eagles, or their parts, nests, or eggs of these lawfully acquired pre act birds ....

APPENDIX L

SUPERSEDING INDICTMENT

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO. 00-199 DSD/JMM

UNITED STATES OF AMERICA,
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

SUPERSEDING INDICTMENT

(16 U.S.C. § 668)
(16 U.S.C. § 703)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1

(Bald & Golden Eagle Protection Act)

On or about November 1, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly offer for sale and sell items that contained golden eagle feathers, to-wit: a Sioux dance shield that contained eight (8) golden eagle feathers was sold for $7,000 and a Native American headdress or bonnet from a Plains tribe was offered for sale for $15,000 to a known witness without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 2

(Migratory Bird Treaty Act)

On or about November 1, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

who had not first obtained a federal permit for the sale of the parts of a migratory bird, did knowingly offer for sale and sell items that contained the parts of a migratory bird, golden eagle feathers, to-wit: a Sioux dance shield that contained eight (8) golden eagle feathers was sold for $7,000 and a Native American headdress or bonnet from a Plains tribe was offered for sale for $15,000 to a known witness, in violation of Title 16, United States Code, Section 703.

COUNT 3
(Bald & Golden Eagle Protection Act)

On or about November 25, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly sell a Native American headdress or bonnet that contained golden eagle feathers from a Plains tribe by accepting a $5,000 payment without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 4
(Migratory Bird Treaty Act)

On or about November 25, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

who had not first obtained a federal permit for the sale of the parts of a migratory bird, did knowingly sell a Native American headdress or bonnet that contained the parts of a migratory bird, golden eagle feathers, from a Plains tribe by accepting a $5,000 payment, in violation of Title 16, United States Code, Section 703.

COUNT 5
(Bald & Golden Eagle Protection Act)

On or about January 19, 2000, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly possess and possess with the intent to sell items that contained golden eagle feathers, to-wit: a Plains tribe headdress or bonnet with train and a

feathered fan with a beaded handle without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 6
(Migratory Bird Treaty Act)

On or about January 19, 2000, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

who had not first obtained a federal permit for the sale of the parts of a migratory bird, did knowingly possess and possess with the intent to sell items that contained the parts of a migratory bird, golden eagle feathers, to-wit: a Plains tribe headdress or bonnet with train and a feathered fan containing the feathers of a scissortail flycatcher, a migratory bird, with a beaded handle, in violation of Title 16, United States Code, Section 703.

COUNT 7
(Bald & Golden Eagle Protection Act)

After January 1, 1997, the specific date unknown to the members of the Grand Jury, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly sell a Sioux Yuwapi medicine wand with seven (7) golden eagle feathers to a known person without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 8
(Migratory Bird Treaty Act)

After January 1, 1997, the specific date unknown to

the members of the Grand Jury, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

who had not first obtained a federal permit for the sale of the parts of a migratory bird, did knowingly sell a Sioux Yuwapi medicine wand with seven (7) golden eagle feathers to a known person, in violation of Title 16, United States Code, Section 703.

A TRUE BILL

/s/ Paul M. Small
UNITED STATES ATTORNEY

/s/ James W. Kennedy
FOREPERSON

APPENDIX M

INDICTMENT

[Stamped "FILED JUL 07 2000
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JUDGMENT ENTD _____
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL 00-199 DSD/JMM

UNITED STATES OF AMERICA,
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

INDICTMENT

(16 U.S.C. § 668)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1

(Bald & Golden Eagle Protection Act)

On or about November 1, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly offer for sale and sell items that contained golden eagle feathers, to-wit: a Sioux dance shield that contained eight (8) golden eagle feathers was sold for $7,000 and a Native American headdress or bonnet from a Plains tribe was offered for sale for $15,000 to a known witness without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 2

(Bald & Golden Eagle Protection Act)

On or about November 25, 1999, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly sell a Native American headdress or bonnet that contained golden eagle feathers from a Plains tribe by accepting a $3,000 payment without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 3

(Bald & Golden Eagle Protection Act)

On or about January 19, 2000, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly possess and possess with the intent to sell items that contained golden eagle feathers, to-wit: a Plains tribe headdress or bonnet with train and a feathered fan with a beaded handle without being permitted to do so, in violation of Title 16, United States Code, Section 668.

COUNT 4

(Bald & Golden Eagle Protection Act)

After January 1, 1997, the specific date unknown to the members of the Grand Jury, in the State and District of Minnesota, the defendant,

TIMOTHY PATRICK KORNWOLF,

did knowingly sell a Sioux Yuwapi medicine wand with seven (7) golden eagle feathers to a known person without being permitted to do so, in violation of Title 16, United States Code, Section 668.

A TRUE BILL

/s/ B. Todd Jones
UNITED STATES ATTORNEY

/s/ Linda Farrell
FOREPERSON

APPENDIX N

AFFIDAVIT OF TIMOTHY P. KORNWOLF

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JUDGMENT ENTD _____
DEPUTY CLERK /s/ PS"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO: CR 00-199 DSD/JMM

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TIMOTHY PATRICK KORNWOLF,
Defendant.

AFFIDAVIT OF TIMOTHY KORNWOLF

State of Minnesota)
) ss.
County of Hennepin)

I, TIMOTHY PATRICK KORNWOLF, being first duly sworn, depose and say:

1. I am the Defendant in the above-captioned action.

2. My father's mother and father and my mother's father and mother died before I was born.

3. My mother's mother's brother, Nicholas J. Klein, was like a grandfather to me. I called him "Uncle Nick."

4. Nicholas J. Klein never married.

5. The American Indian headdress with tail described in Counts 1, 2, 3, 4, 5, and 6 of the Superseding Indictment filed September 7, 2000, in the above-captioned action [hereinafter "HEADDRESS"] contains golden eagle feathers.

6. Prior to October 24, 1962, Nicholas J. Klein gave me the HEADDRESS.

7. The Sioux Indian dance shield described in Counts 1 and 2 of the Superseding Indictment filed September 7, 2000, in the above-captioned action [hereinafter "SHIELD"] has golden eagle feathers appended to it.

8. Prior to October 24, 1962, Nicholas J. Klein gave me the SHIELD.

9. Nicholas J. Klein was born on or about September 17, 1887, and died on or about April 29, 1968.

10. Nicholas J. Klein told me during his lifetime that he had worked for the Buffalo Bill Wild West Show when he was about 17 years old and that he collected the HEADDRESS and the SHIELD while he worked for the Buffalo Bill Wild West Show.

11. The photograph appended to this affidavit as Exhibit A is an accurate depiction of Nicholas J. Klein.

12. During the entire period from October 24, 1962, until the HEADDRESS was seized by agents of the United States of America on or about January 19, 2000, the HEADDRESS was owned by me and under my possession and control.

13. During the entire period from October 24, 1962, until the SHIELD was transferred to an agent of the United States of America on or about November 1, 1999, the SHIELD was owned by me and under my possession and control.

14. During the entire period from October 24, 1962, until the HEADDRESS was seized by agents of the United States of America on or about January 19, 2000, no feathers were added to the HEADDRESS nor were any feathers replaced.

15. During the entire period from October 24, 1962, until the SHIELD was transferred to an agent of the United States of America on or about November 1, 1999, no feathers were added to the SHIELD nor were any feathers replaced.

9 - 21 - 00

Date

/s/ Timothy Patrick Kornwolf
Timothy Patrick Kornwolf

Subscribed and sworn to before me this 21 day of September, 2000.

/s/ Anna Gherity
Notary Public

[Stamped "ANNA M. GHERITY
(seal) NOTARY PUBLIC – MINNESOTA
My Commission Expires Jan. 31, 2005"]

APPENDIX O

AFFIDAVIT OF TIMOTHY P. KORNWOLF

[Stamped "FILED AUG 16 2000
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD _____
DEPUTY CLERK /s/ djd"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO: CR 00-199 DSD/JMM

UNITED STATES OF AMERICA,
Plaintiff,

vs.

TIMOTHY PATRICK KORNWOLF,
Defendant.

AFFIDAVIT OF TIMOTHY KORNWOLF

I, TIM KORNWOLF, being first duly sworn, depose and say:

1. I am the Defendant in the above-captioned action.

2. My father's mother and father and my mother's father and mother died before I was born.

3. My mother's mother's brother, Nicholas Klein (whom I called "Uncle Nick"), was like a grandfather to me.

4. Nicolas Klein never married.

5. Prior to October 24, 1962, Nicolas Klein gave me the headdress with tail containing golden eagle feathers that is described in Counts 2 and 3 of the Indictment in the above-captioned action.

6. Prior to October 24, 1962, Nicolas Klein gave me the shield decorated with golden eagle feathers that is described in Count 1 of the Indictment in the above-captioned action.

7. Nicolas Klein died in 1972. This death estimate is an estimate to meet deadlines and his exact birth and death date can be supplied within one week.

8. Nicolas Klein told me during his lifetime that he obtained the headdress described in paragraph 5 above and the shield described in paragraph 6 above while he worked in the Buffalo Bill Wild West Show.

9. The photograph appended to this affidavit as Exhibit A is an accurate depiction of Nicolas Klein.

10. During the entire period from October 24, 1962, until the headdress described in paragraph 5 above was seized by agents of the United States of America, no feathers were added to the headdress nor were any feathers replaced.

11. During the entire period from October 24, 1962, until the shield described in paragraph 6 above was seized by agents of the United States of America, no feathers were added to the shield nor were any feathers replaced.

Date: Aug. 16 - 00

/s/ Tim Kornwolf
Tim Kornwolf

Subscribed and sworn to before me this 16 day of August, 2000.

/s/ Anna Gherity
Notary Public

[Stamped "ANNA M. GHERITY
(seal) NOTARY PUBLIC – MINNESOTA
My Commission Expires Jan. 31, 2005"]

APPENDIX P

PLEA AGREEMENT AND SENTENCING STIPULATIONS

[Stamped "FILED 10-31-00
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD _____
DEPUTY CLERK /s/ PS"]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CRIMINAL NO. 00-199 (DSD/JMM)

UNITED STATES OF AMERICA,
Plaintiff,

v.

TIMOTHY PATRICK KORNWOLF,
Defendant.

PLEA AGREEMENT AND SENTENCING STIPULATIONS

The United States by its attorneys, B. Todd Jones, United States Attorney for the District of Minnesota, and Clifford B. Wardlaw, Assistant United States Attorney, and the defendant, Timothy Patrick Kornwolf, by himself, and with his attorney, Robert D. Miller, Esq., hereby agree to dispose of this case on the following terms and conditions:

1. The defendant will enter a conditional plea pursuant to Fed. R. Crim. P. 11(a)(2) to Counts 1-4 of the Superseding Indictment which are violations of the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. 16 U.S.C. §§ 608 [*sic*: 668] and 703. The defendant reserves the right to challenge Magistrate Judge's and District Court Judge's rulings on pre-trial motions. The United States will defend the validity of federal wildlife statutes and regulations.

2. The government agrees that it will not re-charge [Counts] 5-8 of the Superseding Indictment. Also, the government will not charge the defendant with interstate transportation of stolen property from the Akta Dakota Museum in South Dakota (beaded boy's britches and quirts).

3. The maximum sentence for this offense is 2 years imprisonment; $2,000 fine; one year supervised release; and a special assessment of $100 per count of conviction.

4. The positions found in this document are binding on the parties. The parties understand that the Court will reach an independent determination on an

appropriate sentence. The parties cannot bind the Court. If the Court reaches a determination that is different than that found in this document then the defendant will *not* be able to withdraw his guilty plea.

5. FACTUAL BASIS On or about November 1, 1999, in Stillwater, State and District of Minnesota, the defendant did sell a Sioux dance shield or bustle that contained eight (8) golden eagle feathers for $7,000.

   On or about November 25, 1999, in Stillwater, State and District of Minnesota, the defendant did receive two wire transfers totaling $5,000 for the sale of a Sioux headdress or bonnet that contained golden eagle feathers.

   The defendant did not have a permit from the United States Fish and Wildlife Service as the United States Fish and Wildlife Service does not issue permits for commercial sales of golden eagle feathers.

6. GUIDELINE CALCULATIONS Offenses that involve fish and wildlife is governed by § 2Q2.1. There is a cross reference to the fraud statute (§ 2F1.1) if the value exceeded $2,000.

• Base offense level	6
• Commercial purpose of pecuniary gain (§ 2Q2.1(b)(3)(B))	2
• Value $20,000-$40,000	4
• CITES animal (§ 2Q2.1(b)(3)(B))	4
TOTAL	16

These guideline calculations are binding on the parties. The Court will make an independent guideline calculation.

7. ACCEPTANCE OF RESPONSIBILITY The United States will recommend a two (2) level reduction for acceptance of responsibility. § 3E1.1(a). This recommendation is conditional on three factors: the defendant will testify truthfully at the change of plea hearing; he will cooperate with probation in the Pre-Sentence Report, including a full and complete disclosure of prior criminal convictions; and, he will pay the $400 special assessment before the sentencing hearing. The defendant will argue for an additional one level reduction under § 3E1.1(b). The government will oppose this motion. Whether or not there is a reduction for acceptance of responsibility will be determined by the Court. If the Court declines to award a reduction for acceptance of responsibility then the defendant will *not* be able to withdraw his guilty plea. The government's position is that the final offense level is 14. The defendant's position is that the final offense level is 13. The parties agree that no other adjustments are applicable.

8. CRIMINAL HISTORY The parties believe that the defendant falls into Criminal History Category I. If, however, there is change in this category then the realities will be controlling. A change in the criminal history category will not be a basis to withdraw from this plea agreement.

9. GUIDELINE RANGES Offense level 16/I: 21-27 months; Offense level 14/I: 15-21 months; and, Offense level 13/I: 12-18 months. The government

agrees that it will argue for a term between 15-21 months.

10. DEPARTURES The United States understands that the defendant will move for a downward departure and will oppose this motion.

11. SPECIAL ASSESSMENT The defendant must pay a special assessment of $400 that is due before sentencing. One hundred dollars per count of conviction.

12. SUPERVISED RELEASE If the Court orders a term of imprisonment then a period of supervised release will also be ordered. There is a maximum of one year of supervised release for this offense. Conditions of supervised release will be ordered by the Court. The defendant must abide the terms and conditions of supervised release.

13. FINES The Court in its discretion may order the defendant to pay a fine. The guideline fine range is $4,000 to $40,000 (I/14). The maximum statutory fine is $2,000. 16 U.S.C. § 707(b)(2).

14. There is not agreement as to the assessment of fines and/or costs of prosecution, imprisonment or supervision. The Court in its discretion may order the defendant to pay a fine and/or costs of prosecution, imprisonment or supervision. Any fine or costs assessed against the defendant will be due at sentencing.

15. The defendant may be ordered by the Court to pay restitution to any victims in this case.

16. The defendant's guilty plea is a final determination of guilt. The defendant reserves the right to chal-

lenge the Court's pre-trial rulings. If the defendant prevails on appeal then he will be able to withdraw his guilty plea. If the defendant does *not* prevail on appeal then he will *not* be able to withdraw his guilty plea.

17. The United States agrees that it will not dispose of the evidence that was seized during the investigation. If the defendant prevails then the evidence that was seized will be returned to the defendant. If, however, the appeal is unsuccessful then the United States will retain possession of the evidence and the defendant will have no ownership interest in the evidence that was seized.

18. The defendant understands that by entering into this plea agreement he is waiving his rights to a jury trial. The defendant fully understands his rights to trial. He has had sufficient time to consult with his attorney. His attorney has explained his legal rights and the operation of the sentencing guidelines to him.

19. The defendant has entered into this plea agreement freely and voluntarily. No threats or promises have been made against the defendant other than the consequences of going to trial.

20. The defendant has freely and voluntarily entered into this plea agreement. The defendant has read this agreement and he fully understands all provisions.

DATED: 31 October 2000

/s/ Clifford B. Wardlaw
Clifford B. Wardlaw
Assistant U.S. Attorney

DATED: 10/31/2000

/s/ Timothy P. Kornwolf
Timothy Patrick Kornwolf
Defendant

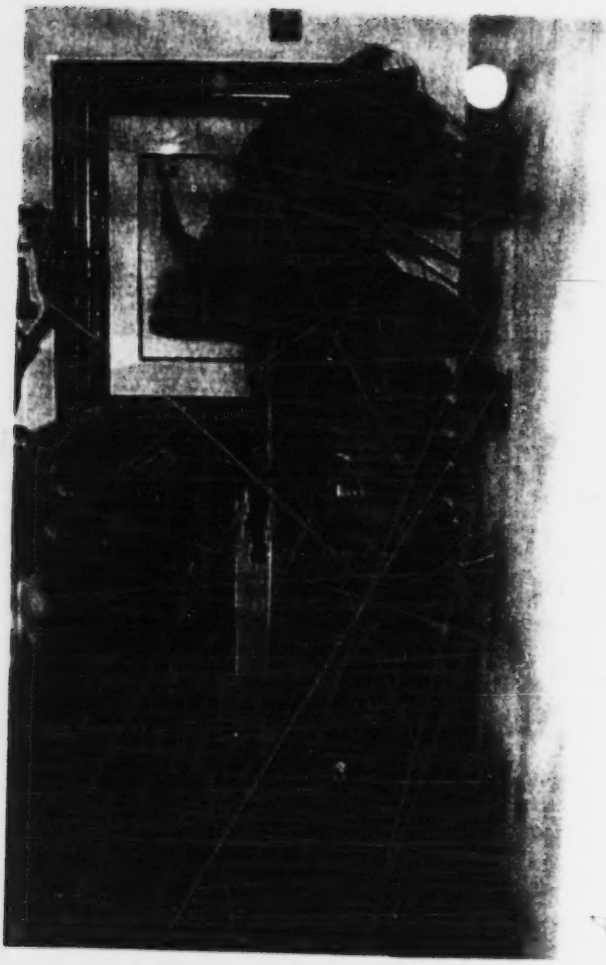
DATED: 10/31/2000

/s/ Robert D. Miller
Robert D. Miller, Esq.
Attorney for Defendant

APPENDIX Q

Government Exhibit #1

APPENDIX R



Government Exhibit #2

APPENDIX S

RENDIGS, FRY KIELY & DENNIS L.L.P.
ATTORNEYS AT LAW

900 FOURTH & VINE TOWER
FIVE WEST FOURTH STREET
CINCINNATI, OHIO 45202-3688

PHONE (513) 381-9200
TELECOPIER (513) 381-9206

WRITER'S DIRECT DIAL NUMBER
(513) 381-9239

March 19,2002

Robert T. Haar, Esq.
Haar & Woods, L.L.P.
1010 Market Street, Suite 1620
St. Louis, MO 63 101

Re: American Indian shields collected by western artist, Henry Farny and acquired in 1938 by Fraser Douglass

Dear Mr. Haar:

This firm represents the family of Fraser Douglass with regard to two Cheyenne Indian shields containing golden eagle feathers. Mr. Douglass, who was in his late 80s when he died last December, spent a career as an art teacher in the Cincinnati Public School system. He was an intense and avid collector and student of American Indian objects, beginning at a time when virtually no art collectors or museums valued them or recognized them as historically important.

These two shields, which would rank among the finest in existence today, were purchased by Mr. Douglass in 1938 from the studio collection of well known western American artist, Henry Farny, who died in 1916. They have been in the Douglass family collection since that time.

Both shields are depicted in a photograph on page 22 of *Henry Farny,* by Denny Carter, Assistant Curator of Paintings of the Cincinnati Art Museum (1978). One of the shields is shown prominently in a Farny painting dated 1900 now in the Amon Carter Museum in Fort Worth, Texas, reproduced on page 178 of Carter's book.

The family wishes to sell the shields. I have advised them that the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act, as interpreted and applied by the Supreme Court in *Andrus v. Allard,* prohibit the sale of the shields which contain golden eagle feathers. The eagle feathers could not be removed without destroying the integrity of these two extremely important historic Native American objects.

The Douglass family is representative of people in this country who, on working people's earnings, collected and cared for objects like these without realizing the part they were playing in preserving these for all of us for all time. The vision of a Northern Cheyenne Indian warrior making a shield of buffalo hide, natural paint and eagle feathers, to aid him in resisting the westward expansion of the 19th century while defending his homeland against overwhelming and decimating odds defines the American spirit of which we are all so proud. Now, notwithstanding the historical and symbolic importance of these shields, they cannot be legally sold by families in legal possession of them, even though the objects predate every applicable law by decades.

Although these objects, and others like them, would have a significant monetary value, they may not be sold. The application of these laws needs to be addressed, which I understand you are doing. Legalizing the sale of such antique American Indian items could not conceivably place the eagle in jeopardy. In the interim, and until the laws are changed, I have advised my clients that they must await the outcome of the petition for certiorari which you will be filing with the United States Supreme Court in the *Kornwolf* case and then, ultimately, await a ruling by the Court.

You have the permission of my clients, and my permission, to include a copy of this letter in the petition for a writ of certiorari that you will be filing in the *Kornwolf* case.

Very truly yours,
RENDIGS, FRY, KIELY & DENNIS, L.L.P.

/s/ W. Roger Fry
W. Roger Fry

WRF/tlm